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No. 90-327

In The

Supreme Court of the United States

October Term, 1990

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, NANCY A. HIORTDAHL AND DON LUHRSEN,

Petitioners,

v.

TELLY KANAKIS AND PATRICIA KANAKIS,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

ROBERT W. CASTLEBERRY, ESQ.
(Counsel of Record)
CALLAHAN, MCCUNE & WILLIS
111 Fashion Lane
Tustin, CA 92680
(714) 730-5700

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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MISSTATEMENTS OF FACT AND LAW IN PETITIONERS' STATEMENT OF THE CASE

Pursuant to 15.1, Rules of the Supreme Court of the United States, Respondents Telly Kanakis and Patricia Kanakis hereby address the statements of fact in Petitioners' STATEMENT OF THE CASE.

I

THERE WAS NO "WINDFALL" TO SERIOUSLY INJURED RESPONDENT TELLY KANAKIS.

Petitioners state on page two of their petition that respondent Telly Kanakis withdrew his claim against

Benefit Fund and pursued his claim against Petitioner Mutual of New York because Respondent "was interested not in coverage, but a windfall." Petitioners "explain" in footnote one on page three that Respondent's $50,000 settlement from the third-party motorist involved in the accident causing the injuries to Respondent exceeded Respondent's total medical expenses and, if Respondent had not withdrawn his claim against Benefit Fund, he would have been required to reimburse Benefit Fund with the settlement he received.

This point was urged by Petitioners in the form of a double recovery argument before the California Court of Appeal which rejected it as "without merit in fact or law." (Appendix to Petition for Writ of Certiorari, p. 17a.) The Court of Appeal reasoned as follows:

> " . . . Telly's hospital and medical insurance expenses here amounted to some $36,897.69. Telly sustained fractures of his left leg – tibia, fibula, and femur – and had nerve damage to his left arm as well as dislocation of his jaw, left wrist and right finger. Five months after the accident he still had a severe paralysis of his left arm, he was in bed for five months after the accident and in a wheelchair for three months after that, unable to move without help of his wife. He had a rod in his leg from the accident at the time of trial. It was not removed within a year of the accident because of Telly's financial inability. He could not raise his left arm at time of trial. He has no income whatsoever from the time of the accident until September. To argue that there will be a double recovery is again without factual support. This settlement was made without allocation as to future medical expenses, pain and suffering, loss of wages, etc. After applying $36,000 of the $50,000 recovery

to medical costs incurred, there remained less than $14,000 for loss of earnings, pain, suffering and the permanent disability sustained by Telly Kanakis. This argument for reversal is without merit in fact or law." (Appendix to Petition for Writ of Certiorari, pp. 16a-17a.)

II

THE EVIDENCE DOES NOT SUPPORT THE PETITIONERS' CONTENTION THAT RESPONDENT PATRICIA KANAKIS RECEIVED ANY INFORMATION THAT HER MEDICAL INSURANCE WAS AN ERISA PLAN; SUBSTANTIAL EVIDENCE SUPPORTS THE OPPOSITE CONCLUSION WHICH IS INHERENT IN THE JURY'S VERDICT.

On page four of the Petition, it is stated that, four months prior to the accident of Telly Kanakis, the employer of Respondent Patricia Kanakis distributed to her an announcement that it had arranged for a medical coverage plan which was "designed to meet [ERISA] requirements and which was accompanied by a 'statement of ERISA rights.' "

In absolute contradiction to these statements, the California Court of Appeal in its opinion stated that Respondent Patricia Kanakis "was not told the insurance policy from MONY was under ERISA rules. The book she received from her employer did not mention the word ERISA. The subject had never been discussed with her." (Appendix to Petition for Writ of Certiorari, p. 5a.)

In support of their argument, Petitioners rely on selected testimony from Matthew Ohrnstein which is attached to the Petition for Writ of Certiorari at pp. 39a-43a.

Other relevant portions of the transcript including testimony of Ohrnstein and respondent Patricia Kanakis are set forth in the appendix. Ohrnstein, the executive vice president and chief financial officer of respondent Patricia Kanakis' employer was a certified public accountant who had graduated from Penn State University and had been employed as such in New York City and Los Angeles. (p. 1A) He testified that his "responsibility is in the acquisition of insurance policies for employees and for the company as a whole" and that he dealt "with an insurance broker who actually handles the one-on-one negotiating with the companies," and that he "rarely if ever [had] communications with the company, the insurance company." (pp. 2A-3A) He was the one in charge of handling the insurance needs of the company and knew very little about ERISA. (p. 4A) Prior to his deposition he does not recall ever seeing Exhibit No. 24 which is entitled "Mutual of New York, Summary of Certain Provisions of Employee Retirement Income Security Act." (p. 5A) Ohrnstein did not know if there were fiduciaries for the insurance, he knew that the company paid the premiums, changed names and addresses, added or subtracted dependents and forwarded claims to the broker or the insurance company and if the claim was not being paid, the company would interface with the broker who would then handle the leg work in resolving the problem. (p. 6A) Ohrnstein did not know if his company had an ERISA policy in 1983 (pp. 7A-8A). The July 31, 1983 letter, Exhibit No. 25, was not drafted by Ohrnstein's company and he could not say whether it was given or distributed to Respondent Patricia Kanakis. (p. 9A) Reviewing the

July 31, 1983 letter did not refresh Ohrnstein's recollection as to whether or not his company had an ERISA plan. (pp. 9A-10A)

Respondent Patricia Kanakis received a booklet from her employer and there was nothing within that booklet mentioning ERISA and she had never heard of that term before. That term was never discussed with her. (pp. 11A-12A)

Under *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58 (1987) ERISA preemption is a federal defense and the burden is on the party raising this defense to prove the facts necessary to establish it. Petitioners' contention on page four that Respondent PATRICIA KANAKIS received a July 31, 1983 letter referring to an ERISA plan was rebutted by her denial that she had ever received anything referring to ERISA and that anyone had ever mentioned ERISA to her and by Matthew Ohrnstein's statement that he could not say she had ever received the letter. The issue over the existence of an ERISA plan was submitted to the jury which found that there was no ERISA plan. That jury verdict was upheld by the trial judge who entered judgment in the case. The California Court of Appeal unanimously sustained the trial judge and the California Supreme Court unanimously refused to grant review of the Court of Appeal decision.

III

PETITIONERS HAVE OMITTED SIX OUT OF THE EIGHT ERISA INSTRUCTIONS GIVEN TO THE JURY.

Petitioners provide a misleading impression of the jury instructions on what constitutes an ERISA plan. They

refer to Special Instruction No. 2 which is Jury Instruction No. 27 setting forth the five elements of an ERISA plan as set forth in *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982). They state that "the Trial Court then instructed the jury" with Special Instruction No. 4, which is Jury Instruction No. 31 and which is set forth in the Petition. In addition to these two jury instructions, the court also gave jury instructions 26, 28, 29, 30, 32 and 33, all of which dealt with what constitutes an ERISA plan. All of the ERISA plan instructions given by the trial court and as set forth in the clerk's transcript are as follows:

No. 26

> The defendants have the burden of proving by a preponderance of the evidence all of the facts necessary to establish:
>
> I. An ERISA employee benefit plan has been established or maintained by ISI.
>
> . . .
>
> "Preponderance of the evidence" means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it.
>
> You should consider all of the evidence bearing upon every issue regardless of who produced it. (Clerk's Transcript (hereinafter C.T.) 390.)

No. 27

> For there to be an ERISA employer benefit plan, these five elements must exist:

1. A plan, fund or program;

2. established or maintained;

3. by Insurance Systems Inc. (ISI), the employer of plaintiff Patricia Kanakis, wife of plaintiff Telly Kanakis;

4. for the purpose of providing medical, surgical, hospital care, sickness, accident, disability benefits;

5. for ISA's participants or their beneficiaries.

(*Donovan v. Dillingham*, 688 F.2d 1367, 1371.) (C.T. 391.)

No. 28

The term "participant" of an employee benefit plan includes an employee of an employer who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or whose beneficiaries may be eligible to receive any such benefit. The term "employee" means any individual employed by an employer. (C.T. 392.)

No. 29

The term "beneficiary" of an employee benefit plan means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder. (C.T. 393.)

No. 30

For the first of the above elements – (a plan, fund or program) – to be proved, there must exist the following:

1. intended benefits;
2. intended beneficiaries;
3. a source of financing;
4. a procedure to apply for and collect benefits.

(*Donovan v. Dillingham*, 688 F.2d 1367, 1372.) (C.T. 394.)

No. 31

The second of the elements listed above to prove that an ERISA employee benefit plan exists – (the plan, fund or program is) *established or maintained* – is proved if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits, and if ISI intended to establish an ERISA plan, being aware that the plan existed. (*Wayne Chemical Inc. v. Columbus Agency Ser.* 567 F.2d 692, 699); *Donovan v. Dillingham* 688 F.2d 1367, 1373.) (C.T. 395.)

No. 32

The purchase of a group policy of insurance covering a class of employees offers substantial but not conclusive evidence that a plan has been established. (C.T. 396.)

No. 33

An employee benefit plan is not required to be established by a formal written plan. If an employer has an employee benefit plan, there are certain fiduciary and reporting requirements, but these requirements are the responsibilities of the administrators and fiduciaries of plans covered by ERISA and are not prerequisites to coverage under ERISA. (C.T. 396.)

As a totality the jury instructions given by the trial court were fair and did not constitute error.

IV

THE UNPUBLISHED COURT OF APPEAL OPINION CANNOT CONFLICT WITH ANY PUBLISHED UNITED STATES SUPREME COURT OR FEDERAL COURT OF APPEAL DECISION AND PRESENTS NO ISSUE OF PUBLIC IMPORTANCE.

Petitioners point out that the California Court of Appeal decision was not published but they fail to note the significance under California Rules of Court. The Court of Appeal opinion states on its face in this case, "NOT TO BE PUBLISHED."

California Rules of Court prohibit the publication of a Court of Appeal opinion unless a majority of the court (976(c), Rules of Court) certify that the opinion meets one or more of the following standards set forth in Rule 976(b), California Rules of Court:

> "(1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule;
>
> (2) resolves or creates an apparent conflict in the law;
>
> (3) involves a legal issue of continuing public interest; or
>
> (4) makes a significant contribution to legal literature by reviewing either the development of the common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law."

Rule 977, California Rules of Court provides that an unpublished opinion "shall not be cited or relied on by a court or a party in any other action or proceeding except . . . when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel" or when the opinion states relevant reasons for a decision affecting the same defendant or respondent in another criminal or disciplinary action or proceeding.

The labeling of the Court of Appeal opinion as not for publication means that the three justice Court of Appeal and the California Supreme Court decided that the Court of Appeal opinion does not establish a new rule of law, that it does not resolve or create an apparent conflict in the law, that it does not resolve a legal issue of continuing public interest, and that it does not make a significant contribution to legal literature.

The unpublished opinion cannot be said to be in conflict with any reported decision of the United States Supreme Court or Federal Court of Appeals because the unpublished opinion cannot be cited or relied upon and therefore has no "existence" other than under the doctrines of the law of the case, res judicata, etc. There are no constitutional rights of any of the parties impacted by the Court of Appeal decision. It is respectfully submitted that no public importance exists in the instant case and the Petition for Writ of Certiorari should be denied.

PETITIONERS' REASONS FOR GRANTING THE WRIT ARE WITHOUT MERIT

I

PETITIONERS MISSTATE THE LAW OF THE ELEMENT OF INTENT IN THEIR DISCUSSION OF *SHAW V. DELTA AIRLINES* AND DECISIONS BY THE FEDERAL COURTS OF APPEAL.

In Section I under Reasons for Granting the Writ, petitioners attack the California Court of Appeal's statement that, "as a prerequisite to the creation and existence of an ERISA plan, the employer must intend to create and to participate in such a plan." (Petition for Writ of Certiorari, p. 6.) Petitioners further argue that an "intent" requirement is contrary to *Donovan v. Dillingham, supra,* 688 F.2d 1367 and to "numerous circuit courts that have adopted" the rule and further "contravenes" reasoning in *Shaw v. Delta Airlines,* 463 U.S. 85 (1983).

Petitioners make no reference to the California Court of Appeal's statement that, "case authority supports such an instruction," (Petition for Writ of Certiorari, p. 14a) or to the California Court of Appeal's direct quotation from *Wayne Chemical, Inc. v. Columbus Agcy. Serv. Corp.,* 567 F.2d 692 (7th Cir. 1977) which requires intent and reads as follows:

> "An employer does not become a participant in, or establish or maintain, a plan by applying for insurance and paying premiums for what it understands to be insurance without any knowledge that the plan exists. *Establishing, maintaining, or participating in a plan requires an intent,* . . . " (Appendix to Pet. for Writ, pp. 14a-14b.)

Petitioners' only reference to the *Wayne Chemical* case is in footnote 3 on page 7 of the Petition for Writ of Certiorari where they discuss not the California Court of Appeal's analysis of the *Wayne Chemical* case but the trial court's reliance on *Wayne Chemical* and Petitioners argue that, "*Wayne Chemical*, however, states merely that establishing a plan 'requires an intent which presupposes an awareness of the existence of the plan.' . . . that language does not support an instruction that specific intent is required to establish an ERISA plan." Petitioners then declare in the same footnote that "even the court that decided *Wayne Chemical* [the 7th Circuit] has embraced the *Dillingham* criteria" citing *Ed Miniat, Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732 (7th Cir. 1986). But the very case cited by Petitioners in fact states as follows,

> "Thus, although *Donovan* and *Taggart* are not controlling here, they do support the defendants' broader contention that we should examine the corporation's intent." (*Id.* at p. 738.)

Petitioners further argue on p. 7 of their Petition that the "*Dillingham* standard" has been adopted by the Second, Fifth, Seventh, Eighth, Ninth and Eleventh Circuits in determining the existence of an ERISA plan, implying in their argument that this rejects any consideration of the employer's intent. However, in support of their argument petitioners cite incredible authority. In their footnote on page 7, they cite a district court case from the Western District of New York as establishing the rule for the entire Second Circuit, a district court case from the Southern District of Mississippi as establishing the rule for the entire Fifth Circuit and a district court case for the Northern District of Alabama as establishing the rule for

the entire Eleventh Circuit. Their authority for the Seventh Circuit, the *Ed Miniat* case, was discussed in the previous paragraph and supports the requirement of intent. The Eighth Circuit decision cited by petitioners, *Harris v. Arkansas Book Co.*, 794 F.2d 358, 360 (8th Cir. 1986) found no ERISA plan in that case.

More incredibly, Petitioners' statement on page seven of their Petition that the Ninth Circuit has adopted "the *Dillingham* standard" which they state on page six of their Petition as contrary to an intent requirement, totally ignores the 1988 Ninth Circuit decision in *Kanne v. Connecticut Gen. Life Ins. Co.*, 859 F.2d 86, 99 (9th Cir. 1988), amended on denial of rehearing, 867 F.2d 489 (1988) (en banc), cert. denied, 109 S.Ct. 3216 (1989). The California Court of Appeal commented on the *Kanne* case as follows:

> " . . . In *Kanne v. Connecticut Gen., supra,* 859 F.2d 96, the federal court pointed out that, *'the plan brochure submitted by Connecticut General as an exhibit at trial describes the plan as an ERISA plan, evidencing the intent of ABC to create an ERISA plan.'* (*Id.* at p. 99, emphasis added.)
>
> We hold that as a prerequisite to the creation and the existence of an ERISA plan, the employer must intend to create and to participate in such a plan. Such intent may be found in acts as well as words. (*Kanne v. Connecticut Gen., supra,* 859 F.2d at p. 99.)" (Appendix to Pet. for Writ, p. 15a.)

It is clear that the California Court of Appeal's reliance on intent as a factor is based on the Ninth Circuit *Kanne* decision. California is within the Ninth Circuit geographical area.

Petitioners' analysis of *Shaw v. Delta Airlines, Inc., supra,* 463 U.S. 85, is misleading. That case involved whether an airline's multibenefit plan which provided benefits in addition to those required under a state disability benefits law came within an ERISA exemption. As pointed out in the *Shaw* opinion, at 463 U.S. 106, ERISA "Section 4(b)(3) exempts 'any employee benefit plan- . . . maintained solely for the purpose of complying with applicable . . . disability insurance laws.' "

Shaw reasoned that, "Section 4(b)(3)'s use of the word 'solely' demonstrates that the purpose of the entire plan must be to comply with an applicable disability insurance law." (*Id.*, at 206.) Thus, *Shaw* concluded, "the test is not one of the employer's motive – any employer could claim that it provided disability benefits altruistically, to attract good employees, or to increase employee productivity, as well as to obey state law – but whether the plan, as an administrative unit, provides only those benefits required by the applicable state law." (*Id.* at p. 106.)

Petitioners have misstated authority on the role of the employer's intent in the Second, Fifth, Seventh, Eighth, Ninth and Eleventh Circuits and have misconstrued the *Shaw* case. Their primary argument for granting a writ in this case should be rejected.

II

THE PETITIONERS' ATTEMPT TO DISTINGUISH THE *FORT HALIFAX* CASE IS WITHOUT MERIT AND THEY HAVE IGNORED THE NINTH CIRCUIT *KANNE* ANALYSIS OF THE REQUIREMENT OF THE EMPLOYER'S INVOLVEMENT IN THE ADMINISTRATION OF THE BENEFIT PROGRAM.

The California Court of Appeal opinion concluded that, "The focus of ERISA is on the administrative integrity of *employers'* benefit plans," that "ERISA preemption presumes some specie of administrative activities by the employer is taking place [citation omitted]" and that, "the existence or lack of existence of an ERISA plan depends upon the extent to which the employer is involved in the administration of the benefit program so as to implicate the concerns which gave rise to ERISA." (Petition for Writ of Certiorari, pp. 11a-11b.) In reaching that conclusion, the Court of Appeal pointed out that the United States Supreme Court in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987) observed that,

> " 'An employer that makes a commitment systematically to pay certain benefits undertakes a host of obligations, such as determining the eligibility of claimants, calculating benefit levels, making disbursements, monitoring the availability of funds for benefit payments, and keeping appropriate records in order to comply with applicable reporting requirements.' " (Appendix to Pet. for Writ, p. 10a.)

The California Court of Appeal also quoted as follows from the *Fort Halifax* case:

> *" . . . the Maine statute not only fails to implicate the concerns of ERISA's pre-emption provision, it fails to implicate the regulatory concerns of ERISA*

> *itself.* The Congressional declaration of policy, codified at 29 U.S.C., 1001, states that ERISA was enacted because Congress found it desirable that 'disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of [employee benefit] plans.' . . . *The focus of the statute thus is on the administrative integrity of benefit plans – which presumes that some type of administrative activity is taking place.*" (*Id.*, p. 15, emphasis added.)
>
> The Supreme Court further declared, 'The foregoing makes clear both why ERISA is concerned with regulating benefit "plans," and why the Maine statute does not establish one. Only "plans" involve administrative activity potentially subject to employer abuse. The obligation imposed by Maine generates no such activity. There is no occasion to determine whether a "plan" is "operated" in the interest of its beneficiaries, *because nothing is "operated."* No financial transactions take place that would be listed in an annual report, and no further information regarding the terms of the severance pay obligation is needed because the statute itself makes these terms clear. It would make no sense for pre-emption to clear the way for exclusive federal regulation, for there would be nothing to regulate. *Under such circumstances, pre-emption would in no way serve the overall purpose of ERISA.*' (*Id.* at p. 16, emphasis added.) (Appendix to Pet. for Writ, p. 11a)

California is within the Ninth Circuit geographical area and the California Court of Appeal carefully analyzed the Ninth Circuit *Kanne* case as follows:

> "What is an employer plan under ERISA is illustrated in *Kanne v. Connecticut General Life Ins., Co., supra,* 859 Fed.2d 96, and cited by the California Supreme Court as an authoritative

statement of the federal ERISA law in *Commercial Life Ins. Co. v. Superior Court, supra,* 47 Cal.3d 473, 482, 483. The plan brochure, introduced by the insurance company, described the plan as an ERISA plan. Associated Builders and Contractors (ABC) was an employer group to which the employer (Harlo Carpets) belonged, and was described as the administrator of the plan. The employer subscribed to a group health insurance plan administered by ABC. Pursuant to the requirements of ERISA, the plan was established as a trust entity, called the ABC Trust. It purchased a policy of group health insurance from Connecticut General. Kanne was an employee of Harlo Carpets and covered by the insurance policy. The *Kanne* court observed the Connecticut General brochure describes the plan as an ERISA plan, *"evidencing the intent of ABC to create an ERISA plan."* (*Kanne v. Connecticut General Life Ins. Co., supra,* 859 F.2d 96, 99, emphasis added.)

It concluded ABC, the employers' group, was an administrator of the plan subject to ERISA regulations. The court also pointed out '[a] bare purchase of insurance, without any of the above elements present, does not constitute an ERISA plan (although it may be evidence of the existence of an ERISA plan).' (*Kanne v. Connecticut General Life Ins. Co., supra,* 859 F.2d 96, 99, emphasis added; see also *Donovan v. Dillingham, supra,* 688 F.2d 1367, 1375; *Martori Bros. Distributors v. James-Massengale* (9th Cir. 1986) 781 F.2d 1349, 1358.)" (Appendix to Pet. for Writ, p. 12a.)

The California Court of Appeal then applied the *Kanne* rules to the instant case:

"Contrast the undisputed facts here. The only responsibilities and duties of the employer of Patricia Kanakis was to have the MONY

> applications filled out for each employee, to name the beneficiaries on the life insurance, to inform the insurance company who the employees were, to pay the premiums directly to the company, to reconcile the statements regularly, and to act as a conduit for employee questions or problems regarding the policies.
>
> There is a total lack of evidence here as to the nature of the employer's administrative participation in any plan. Patricia's employer simply obtained the medical benefits for its employees through the purchase of the MONY policy. It distributed the booklets to its employees describing the benefits and claims procedures." (Appendix to Pet. for Writ, pp. 12a-13a.)

From the foregoing, it is also clear that Congressional intent as discussed above is the answer to Petitioners' arguments on tax implications and public policy. As pointed out by the California Court of Appeal in its opinion, the *Fort Halifax* case stated that, "'"[T]he purpose of Congress is the ultimate touchstone."'" (Appendix to Pet. for Writ, p. 10a.)

Finally, in Petitioners' concluding paragraph on page 13, they put themselves in the guise of protectors for the employee as well as the employer by asserting the ERISA purpose of protecting the "millions of employees and their dependents" and the "public policy" argument that the California Court of Appeal decision "runs contrary to the ultimate interests of participants, employers and third parties administering plans." Their posturing is hypocrisy. Telly Kanakis was severely injured on November 29, 1983. He was covered by medical insurance for which his wife, Respondent Patricia Kanakis was paying on a

monthly basis. The Petitioner insurer never paid a cent for the medical bills of petitioner Telly Kanakis until after the Application for a Stay of Enforcement of the Judgment was denied by Justice Sandra Day O'Connor in this case on June 18, 1990.

CONCLUSION

For all of the foregoing reasons, the Writ of Certiorari should not issue.

Respectfully submitted,

ROBERT W. CASTLEBERRY
(Counsel of Record)
CALLAHAN, MCCUNE & WILLIS
111 Fashion Lane
Tustin, CA 92680
(714) 730-5700

September 20, 1990

APPENDIX

EXCERPTS OF TRIAL TRANSCRIPT

TESTIMONY OF MATTHEW OHRNSTEIN

A Yes, I was a graduate of Penn State University, University Park, Pennsylvania, I have a Bachelor of Science Degree in Accounting. I am a certified public accountant, member of Pennsylvania Institute of CPA's and American Institute of CPA's.

Q Are you presently employed?

A Yes, I am.

Q By whom are you employed?

A Currently employed by Care Systems Corporation.

Q Is Patricia Kanakis an employee of that organization?

A Yes.

Q How long have you been with Care Systems, Sir – what capacity?

A I have been with Care Systems since July 1, 1983 and my current capacity is Executive Vice-President, Chief Financial Officer and Corporate Secretary.

Q Can you give me the background of the company where you are working at this time, what they do?

A Okay.

The company was founded in 1978, privately-held corporation by several entrepreneurs in the latter

part of '78, a company by the name of Insureco, Incorporated, which is now a fully-owned subsidiary of Transamerica Corporation, purchased the majority interest in the predecessor corporation, which was Insurance Systems Incorporated.

Insureco held this investment until 1983, then sold the corporation to a group of investors who currently continue to hold the majority of the company.

At the time of the 1987 acquisition by Insureco, I was employed by Pete Marlow Mitchell, Certified Public Accountants, in New York City, later in Los Angeles.

In 1980, I joined Insureco Incorporated, that parent company, and stayed with Insureco until the time that Insurance Systems Incorporated was sold to Ventur Capital Investors (Phonetic Spelling), the Company Care Systems – you asked what our business is – I am giving you a long answer to a short question.

Care System provides automation systems and services to insurance companies, agents and brokers, nationally.

. . .

Q Do you have anything to do with obtaining insurance benefits for your employees or employees of care?

A Yes, I do.

Q What do you have to do as far as that is concerned?

A My responsibility is in the acquisition of insurance policies for employees and for the company as a

whole, I deal with an insurance broker who actually handles the one-on-one negotiating with the companies.

I rarely if ever have communications with the company, with the insurance company.

Q Do you try and get good benefits for your employees and you rely on your broker to go out and check the marketplace and –

A Yes, my broker is an independent broker and represents companies and brings to me a proposal each year or in the case of markets where there is volatile changes, brings me information several times a year in order to see what the best program for our employees is, both from the covered standpoint and cost standpoint.

Q The underlying accident, which is the subject matter of this lawsuit, occurred in November, 1983.

Your company was called ISI at that time.

A The company was called Insurance Systems Incorporated, yes.

Q And Patricia Kanakis was an employee of the company at the time?

A To the best of my knowledge, yes.

Q By whom did your employees have health benefits with that company or with – for your company?

A At that time we were covered by Mutual of New York for our life – some of our life and our health insurance, in addition to which we were covered by Standard Insurance Company of Oregon for disability, life, accidental death and dismemberment. (R.T. 318-321.)

* * *

Q Do you know whether Mrs. Kanakis had her husband on the policy?

A The only information I have on that is what comes from a document that was produced for purposes of this case, which is an application that Mrs. Kanakis filled out and from my reading of that application, it appears that her husband was added as a dependent. (R.T. 323).

* * *

Q By Mr. Castleberry: You were the man in charge at that time in handling the insurance needs of your company?

A Shortly after joining the company, in July, I was – I had implied responsibility for handling the relationship between our company and benefit bank coordinators.

Q This was not a self-funded –

A No, it was not.

Q No committees.

A No formal committees but we managed the company as a democracy in many fashions.

Q Do you know anything about ERISA?

A Very little.

Q Let me show you a document marked as 23, a November 15, 1983, letter addressed to you, from MONY. (R.T. 325-326).

* * *

Q By Mr. Castleberry: Let me show you a document marked 23.

The Court: 24 would be your next number.

Mr. Castleberry: I'm sorry, 24.

Has the title "Mutual of New York, Summary of Certain Provisions of Employee Retirement Income Security Act."

It is one, two, three, four, five pages long. Do you have a copy of that in your file?

A I have that with me, yes.

. . .

Q Would you mark 24 in the bottom right-hand corner – Well, we will use yours, if that is all right.

Do you remember seeing that document?

A I retrieved this document from our file at our deposition – my deposition.

Prior to that point, I don't recall ever seeing it.

Q Do you know if any of the items on this particular document were compiled with –

. . .

The witness: I need to read through here and respond one by one.

Mr. Pierik: I will also object, lack of foundation.

The Court: If you know, you may answer, sir.

The witness: Firstly, on the named fiduciaries, I mentioned earlier I don't know if there were fiduciaries.

There were people in my company that had responsibility for the relationship but as a title, fiduciaries, I don't know if it was ever formalized.

Q The people in your company would see that the premiums were paid, is that right?

A Yes.

Q The name changes were made, addresses changed?

A Yes.

Q Adding or subtracting a dependent, something of that nature; is that right?

A Yes.

Q If he had a claim, they would forward onto the broker or company.

A We would not see it. It would go off to the company.

Q If somebody wasn't getting paid by Mutual of New York, your company wouldn't handle it?

A To the extent it was not being paid by Mutual of New York, they would come to our personnel and voice a concern or complaint and the personnel department would then interface with our broker and then, from that point, the broker would handle all of the leg work in determining the resolution to that problem.

Your company would pass it on to someone else, either directly or directly to the company, would not go directly to Mutual Life; is that it?

A Please rephrase that.

Q Your company, for the most part, interfaced directly with Mutual Life, would they?

A No.

Q Is that correct?

A That is correct.

Q They, if there was a complaint, they would pass it on to the broker?

A Yes.

Q You relied on your broker to get you good coverage?

A Our broker is outstanding. We have been using him for the predecessor company since 1980 and continue to use him.

Q Did you believe at the time frame, November 1983, you had an ERISA policy?

Mr. Pierik: Objection –

Mr. Castleberry: Or did you know?

Mr. Pierik: Objection, irrelevant, lack of foundation.

The Court: I take it this is preliminary, Mr. Castleberry:

Mr. Castleberry: Yes, your honor.

The Court: The objection is overruled; you may answer, if you know.

A I don't know.

Q By Mr. Castleberry: Do you have a two-page document dated July 31st, 1983?

. . .

Q By Mr. Castleberry: Did you produce that letter, sir?

A I believe I did.

Q This – this letter dated July 31st or was it written by someone from Mutual Life?

A This letter, to the best of my knowledge, was not drafted by somebody in our company; it was either something that was generated by Mutual of New York or Benefit Plan Coordinators. I don't recall which.

The Court: Now, then, a moment ago you said you produced it.

Are you talking about the same document, when you say MONY produced it or someone else other than you produced it?

Q By Mr. Castleberry: You didn't mean you produced, you are bringing it?

A I thought said produced, that I produced at the deposition or am I producing here.

We did not authorize this.

Q Do you have any idea whether that document was ever sent to Patricia Kanakis or any of the employees of Insurance Systems Incorporated?

A I could not say I know it was given or distributed to her, but I could say that it was probably – a speculation.

Q I don't want you to speculate, sir.

You couldn't say.

A Couldn't say. (R.T. 328-333)

* * *

Q By Mr. Pierik: Mr. Ohrnstein, before our break, I was directing your attention to Exhibit 225, which is the same as Exhibit C, the announcement to your employees, July 31, 1983 – do you have those exhibits in front of you?

A Yes.

Q Directing your attention to the first sentence of the third paragraph which, let me read it to you.

> "This announcement and the accompanying booklet are designed to meet the summary plan description requirement of the Employment Retirement Income Security Act, commonly known as ERISA."

Do you see that entry in the document?

A Yes.

Q Does that refresh your recollection as to whether or not the mutual policy was, according to your understanding, an ERISA policy?

A No, it does not.

Q Do you know one way or the other whether this was – or you have an understanding one way or the other whether this was an ERISA plan?

A I don't.

Mr. Pierik: Thank you. (R.T. 356-357.)

* * *

Q You had a file specifically for Mutual of New York?

A Yes, I did.

Q Were exhibits 24, G and H in that file?

A 24, I believe – was it of that file during our deposition when you asked if there were other documents dealing with Mutual of New York – I don't know why these were in here.

The Court: In where?

The witness: Inside my book.

The Court: Inside your deposition transcript?

The witness: Yes.

Q By Mr. Pierik: Did you put them there?

A I did – I think, when, during our deposition, when the ERISA question started coming was a – this is chief financial officer of my company – I wanted to know what is this ERISA thing, what is this all about, so I found these documents in that generic group insurance file and, like I say, my reading of the deposition, they were left in there. (R.T. 363)

* * *

TESTIMONY OF PATRICIA KANAKIS

Q By whom are you employed?

A Insurance Systems Incorporated. They have recently, in the last year, changed their name to Care Systems. (R.T. 199.)

* * *

Q By Mr. Castleberry: Did you make a – or receive a folder from your company about the benefits under that policy?

A Yes, I did.

. . .

Q By Mr. Castleberry: Does that appear to be the document that you received?

A It does.

Q Who did you receive that from?

A My personnel director through my work.

Q Did you ever read that at any time before your husband's accident?

A I looked through it.

Q Do you remember receiving any of the documents at any time prior to your husband's accident about the benefits under that policy?

A Not that I recall.

Q Did you discuss it with anybody before your husband's accident, what benefits you would have?

A No.

Q Did you ask that your husband be covered under that policy?

A Yes, I did. (R.T. 201-202).

* * *

Q You have had a chance to look at that particular booklet since the accident, haven't you?

A Yes, I have.

Q Is there anything within that booklet that mentioned the word "ERISA"?

A No.

I have never heard of that term before.

Q Anybody from your company ever discuss the term "ERISA" with you?

A Absolutely not. (R.T. 205)

* * *